IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

NO. 78-492

REV. CHARLES H. NEVETT, et al.,

Petitioners,

v.

LAWRENCE G. SIDES, etc., et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY MEMORANDUM

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In their Opposition, the respondents raised two factual points deserving of a reply (though not dispositive of the case), and a challenge to the petitioners' right to seek certiorari on what respondents claim was decided in an earlier appeal.

I. REVIEW IS PROPERLY SOUGHT OF LEGAL CONCLUSIONS AND FACT FINDING REACHED IN THE FIRST APPEAL AND ADOPTED BY REFERENCE OR SUB SILENTIO IN THE SECOND APPEAL.

At several places in the Opposition, respondents argue that the petitioners have waited too late to seek review of the Nevett I decision of the court of appeals. Petitioners therefore should make it clear that they are not seeking review of Nevett I, except to the extent that its reasoning was adopted by Nevett II.

The first opinion ended in a judgment that "remand[ed] to the district court to reconsider its findings." 102a. That was not the type judgment for which review should be sought in this Court. But the second opinion relied at certain points on the first opinion, e.g., 50a.

In at least one important respect, the second opinion relied upon what petitioners assert is a mistaken factual determination in the first appellate decision. See 5a, n. 6, where the court of appeals asserted that blacks constituted 50 per cent of the registered voters in 1970. Petitioners sought review of both opinions and judgments, Petition, 1, so that they would

not be foreclosed from challenging anything in the first opinion which might be argued to be binding as the law of the case.

II. FACTUAL MATTERS.

The respondents erroneously claim, Opposition, 9, that there "is nothing in the record before this Court to show" that black candidates usually carried their own wards in the 1972 elections, even though they were defeated at large. But the official canvas of the 1972 election was introduced at trial and is reproduced in the court of appeals' appendix, 26-27. This exhibit shows that black candidates won or tied in Wards 1, 2 and 5.

The respondents have also attempted to pass the responsibility for the low number of black city employees to the Personnel Board, an independent agency. Petitioners might note that the Board is presently under federal court orders (issued subsequently to the trial of this case) to cease discrimination against blacks and women through the use of non-validated testing procedures. Even beyond that, the record in the case shows that the city council refused to hire a black who was one of the three persons certified by

the Personnel Board to the City for a clerical position. 118a.

But even without direct control, the respondents may not so easily avoid the responsibility for the great racial disparity in its employment practices. In a suit against the Montgomery County, Alabama, Commission, the elected officials made a similar argument regarding employment by a sheriff. Judge Frank M. Johnson, Jr., made the following finding:

> That the Commission lacks legal authority to control the Sheriff does not mean that it lacks influence. There is no evidence, however, that the Commission has exercised that influence to represent the interests of its black constituents. . . .There can be little doubt that a Commission responsive to the black community would have been less passive and more diligent in its supervision. Hendrix v. McKinney, ___F.Supp. ____, Civil Action No. 74-264-N (M.D.Ala. Nov. 15, 1978), p. 13.

III. PETITIONERS URGE REVIEW HERE BECAUSE OF THIS COURT'S DECISION TO HEAR ARGUMENT IN CITY OF MOBILE V. BOLDEN, NO. 77-1844.

Subsequent to the filing of the petition here, this Court noted probable

jurisdiction in City of Mobile v. Bolden, No. 77-1844, 99 S.Ct. 75 (1978). Bolden was decided with Nevett by the same panel of the court of appeals. In fact, the explication of law applicable to both cases was written in the Nevett opinion.

While Bolden presents additional issues regarding the commission form of government, the decisions are quite similar. The basic difference is in the result--Bolden found intentional discrimination; Nevett II did not. Bolden could be resolved without resolution of whether or not this is a necessary element of proof in dilution claims, and would not necessarily resolve petitioners' contention that the court of appeals' opinions were inconsistent with White v. Regester, 412 U.S. 755 (1973). Petitioners suggest that the Court would benefit from the joint consideration of these cases, now in differing postures, and urge review be granted herein.

Respectfully submitted,

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